SUPREME COURT, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-415

FRANCIS A. RONDEAU, *Petitioner*

v.

MOSINEE PAPER CORPORATION, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (App. 161-181) is reported at 500 F.2d 1011.

JURISDICTION

The judgment of the Court of Appeals was entered July 16, 1974 (App. 2). On October 12, 1974, a petition for a writ of certiorari was filed, and was granted on December 16, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Did the Court of Appeals correctly decide that a showing of irreparable harm was not a prerequisite to granting injunctive relief under section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d)?

II. Did the Court of Appeals correctly decide that an unintentional, non-covert and non-conspiratorial violation of section 13(d) must be "neutralized" to deny the violator the benefit of his wrongdoing by the entry of a decree, after the violation has been corrected by filing a legally sufficient Schedule 13D, enjoining the violator from voting the shares he acquired in the period between the date he should have filed his 13D Schedule and the date it was actually filed?

STATUTE INVOLVED

Section 13(d) of the Securities Exchange Act of 1934 as created by the amendment known as the Williams Act, 82 Stat. 456, codified at 15 U.S.C. § 78m(d) provided as of the dates involved in this case:

> (d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to Section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in Section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum* of such class shall, within ten days after

* Prior to December 31, 1970 this was ten percentum; the amendment was accomplished by Pub. L. 91-567, 84 Stat. 1497.

such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in Section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank, shall not be made available to the public;

(C) If the purpose of the purchasers or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to

make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(d)(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commissions, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d)(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate

or group shall be deemed a "person" for the purposes of this subsection.

(d)(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(d)(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(d)(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of se-

curities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of any equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

STATEMENT

On February 13, 1973 the petitioner's (hereafter "Rondeau") motion for summary judgment dismissing respondent's (hereafter "Mosinee") complaint was granted by the District Court. The complaint charged Rondeau with, inter alia, violation of section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m (d) (App. 9-11). The District Court found that Rondeau had failed to file a timely Schedule 13D but that the error was unintentional and non-conspiratorial, that Mosinee was in no danger of irreparable harm because of the violation, and that Rondeau had subsequently filed a legally sufficient Schedule 13D. On these findings the District Court held no relief was appropriate and dismissed the action. The Court of Appeals for the Seventh Circuit reversed the District Court upon the grounds (1) that no danger of irreparable harm was necessary for injunctive relief under section 13(d); and (2) that violation of section 13(d) in and of itself mandated injunctive relief against the viola-

tor regardless of the reasons for the violation. The Circuit Court remanded the case to the District Court with instructions to enter a decree enjoining Rondeau from further violations of section 13(d) and from voting 26,000 shares of Mosinee stock (representing 3% of his holdings and the number of shares he purchased between the due date of the Schedule 13D and the date of its actual filing) with respect to any takeover, proxy contest or election of officers or directors for a period of five years.

The District Court determined that there was no genuine issue of material fact. The Court of Appeals concurred in that conclusion and accepted the District Court's factual findings. Circuit Judge Pell dissented from the Court of Appeals' decision and in his dissenting opinion considered the argument of Mosinee that there were in issue disputes of material fact which precluded the District Court from granting summary judgment. After examining that argument and conceding that the question might be close, Judge Pell concluded that the District Judge intended simply to state the uncontroverted facts and that the summary judgment was proper. What follows is a synopsis of the operative facts found by the District Court.

Mosinee is a Wisconsin corporation located in central Wisconsin, engaged in the manufacture of pulp and paper. Its only class of equity security is common stock which is registered pursuant to section 12 of the Securities Exchange Act (15 U.S.C. § 781). There were 806,177 shares of its stock outstanding on August 31, 1971. During the period when Rondeau was purchasing Mosinee stock, Clarence Scholtens was President of Mosinee and John Forester was its Chairman. Mr. Forester, his wife, and trusts managed by him, were

collectively the largest shareholders of Mosinee in 1971. Rondeau has engaged in the cold storage business and other business activities in Mosinee and Wausau, Wisconsin. His association with Mosinee Cold Storage, Inc. and Wausau Cold Storage, Inc. and Wausau Cold Storage Company, Inc. was known to Scholtens and Forester.

In the winter of 1971, Rondeau concluded and openly expressed the opinion that Mosinee stock was underpriced and a good investment. He made his first purchase of Mosinee stock in his own name on April 5, 1971, at $12.50 per share. He continued to purchase Mosinee shares until the last transaction was concluded on August 4, 1971. He placed no further orders for Mosinee shares after July 30, 1971. Rondeau's purchasers of Mosinee shares was open and notorious. The shares were registered in his name or in the names of companies and partnerships with whom he was known to be associated, some of which bore his name.

Very shortly after Rondeau's first purchases of Mosinee shares were registered on the books of Mosinee's stock transfer agent, Mosinee's president, Scholtens, and its chairman, Forester, learned of Rondeau's purchases. His substantial purchases of Mosinee shares was known to brokers and businessmen in the communities of Mosinee and Wausau. When his holdings reached 18,000 shares on Mosinee's records, Mr. Scholtens contacted Mr. Rondeau by telephone to welcome him as a new substantial shareholder. Rondeau stated in that conversation that he felt the stock was underpriced and was a good investment; that he would continue to purchase shares and might acquire up to 40,000 shares, and that he was perfectly happy with the operation. Starting in April and continuing

through July, 1971 both Scholtens and Forester maintained tabulations of the cumulative total of Rondeau's purchases of Mosinee stock.

By May 17, 1971, Rondeau had acquired a total of 40,413 shares of Mosinee stock. At that time, 40,309 shares represented 5% of the outstanding stock of Mosinee. Accordingly, section 13(d) of the Securities Exchange Act of 1934, as amended by the Williams Act (82 Stat. 456, 15 U.S.C., § 78m(d)) and the regulations issued pursuant to it, required Rondeau within ten days (May 27, 1971) to transmit to Mosinee and file with the Securities Exchange Commission a Schedule 13D. The District Court found that Mr. Rondeau did not know that he was required to file a Schedule 13D when his holdings exceeded 5%; that he did not obtain that information until July 30, 1971 when, after receiving a letter from Mr. Forester which in part stated that Rondeau's activity in Mosinee stock may be creating problems under the federal securities laws, Rondeau, for the first time, consulted his attorney. Rondeau had been casually advised in the past that he did not need to file anything with the SEC until his holdings exceeded 10%. That had been the law until December of 1970 when the Securities Exchange Act of 1934 was amended to reduce the filing requirement from 10% to 5%. (App. 142-3) Upon learning that he was required to file a Schedule 13D, Rondeau directed his accountants to work continuously to gather the information required by the Schedule and he placed no further orders for plaintiff's stock. He filed his Schedule 13D on August 25, 1971 and filed an amendment and supplement to the Schedule on September 29, 1971. This action was commenced on September 2, 1971.

Beginning on July 30, 1971 (the same time that he communicated by letter with Rondeau), and continuing for the next four trading days, Mr. Forester, and trusts that he managed, purchased over 20,000 shares of Mosinee stock, which the District Court found was not an unusual volume of transactions for the trusts involved.

The District Court found there was no concrete evidence warranting a finding that Rondeau seriously considered attempting to obtain control of Mosinee prior to the time he conversed with his attorney by telephone after receiving Mr. Forester's letter of July 30, 1971. The Court found that Rondeau and the other defendants named in the District Court action did not engage in any intentional covert or conspiratorial conduct in failing to timely file the Schedule 13D.

The District Court found that Rondeau's purchases of Mosinee stock created some concern on the part of Mosinee management, some of its employees and some of its shareholders with respect to the consequences of a possible tender offer and subsequent change in the control of the company; that this anxiety may have been somewhat worsened by rumors about Mr. Rondeau's intentions which resulted from his failure to articulate his purpose in a timely 13D Schedule. The District Court concluded, however, that there was no evidence in the voluminous record which would support a finding of irreparable harm. (Twenty-three depositions were taken involving over 1,000 pages of transcript. Mosinee thoroughly and completely examined Rondeau and his associates and their records.) The District Court found that Rondeau's Schedule 13D, as amended, was legally sufficient and did not contain misrepresentations of fact.

Mosinee filed a motion for a preliminary injunction but the motion was withdrawn prior to the scheduled hearing (App. 139). Rondeau moved for summary judgment and urged a speedy disposition of the action because the very pendency of this action made it impossible for him to proceed with a tender offer or proxy contest if he should decide so to do. (App. 134). Neither Rondeau nor any other person or firm has engaged in a tender offer for Mosinee's stock since this action was filed in September, 1971. The annual meetings of Mosinee held in the spring of 1972, of 1973 and of 1974 were conducted with no proxy contest; at each of these meetings the management slate of directors was elected without contest.

SUMMARY OF ARGUMENT

Section 13(d) of the Williams Act was designed to inform corporation shareholders of large aggregations of stock by any individual or group. It is essentially a disclosure measure, not meant to favor corporate management desirous of retaining its position. However, section 13(d) has come to be viewed as a weapon by entrenched corporate management against efforts by new shareholders to exert influence on corporate policy. The decision of the Court of Appeals in this case encourages such a view.

The district courts, as triers of fact, must have the means and freedom to fashion a remedy that fits the facts in each case. The Circuit Court decision deprives section 13(d) and the district courts of needed flexibility to deal effectively and fairly with different fact situations. Without regard to the facts, the Circuit Court decision prescribed an inflexible punishment which Congress did not enact. Additionally, in order to reach

this judgment, the Circuit Court abolished a traditional prerequisite of injunctive relief: the finding of irreparable harm. In arbitrarily restructuring the elements of injunctive relief and creating a punishment for violation of section 13(d), the Circuit Court overlooked the purpose of the Williams Act and ignored the weight of judicial authority.

ARGUMENT

I. THE WILLIAMS ACT: HISTORY AND JUDICIAL CONSTRUCTION

A. The Williams Act was designed to provide information to stockholders, not as a weapon for management.

The Williams Act was enacted to provide certain specified information to management and shareholders in advance of a tender offer or proxy contest. Section 13(d) does not by its terms provide penalties for its violation or mandate any civil remedy. The federal courts have, therefore, been free to fashion remedies appropriate in each particular case.

The legislative history of the Act (H. Rep. No. 90-1711, 90th Cong., 2d Sess., pp. 2811-2823 (1968)) traces the background and need for such legislation. "It was urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company. The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the take over bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and man-

agement equal opportunity to fairly present their case." (*Id.* at 2813).

It is most significant that the Act is intended to provide the offeror and management "equal opportunity" to fairly present their case. Given the concern of the Congress against tipping the scales in favor of entrenched management, it is evident that the purpose of the Williams Act would be frustrated, rather than effectuated should Rondeau's stock be sterilized. The type of "equal opportunity" contemplated by Congress will disappear if management is able to invoke a technical violation of the filing requirements of section 13(d) against an individual who acted openly at all times with respect to his purchases, who promptly filed the required schedule upon learning of the requirement, and whose only fault was lack of knowledge of the then recently amended ownership percentage requirements of the Act.

The purpose of the Williams Act has also been clearly articulated by a number of courts. In *Electronic Specialty* v. *International Controls Corp.,* 409 F.2d 937 at 948 (2d Cir. 1969), the court commented: "Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent management to protect its own interests against the desires and welfare of the stockholders."

A similar view was expressed by the district court in *Nicholson File Co.* v. *H. K. Porter Co.,* 341 F.Supp. 508 (D.R.I. 1972) and the court of appeals in *GAF Corp.* v. *Milstein,* 453 F.2d 709 at 719 (2d Cir. 1971), *cert. denied* 406 U.S. 910 (1972): "The history and lan-

guage of section 13(d) make it clear that the statute was primarily concerned with disclosure of potential changes in control from new aggregations of stockholdings." See also *Butler Aviation International Inc.* v. *Comprehensive Designers Inc.,* 425 F.2d 842 at 845 (2d Cir. 1970); *Susquehanna Corp.* v. *Pan American Sulphur Co.,* 423 F.2d 1075 at 1085 (5th Cir. 1970).

With the Williams Act, Congress adopted a neutral position between incumbent management and the offeror while giving the shareholder the protection he needed. The Act's disclosure requirements embody the basic principle of federal securities regulation—to prevent investor fraud by educating the shareholder.

B. Section 13(d) although not creating a remedy may be enforced through a private cause of action.

The federal courts have the power to grant appropriate relief in private actions brought to enforce the 1934 Securities Exchange Act.

In respect to laws regulating securities, the Supreme Court in *J. I. Case Co.* v. *Borak,* 377 U.S. 426 at 433 (1964), made it clear that "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences . . . are . . . federal questions (and) it is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded." Although the Williams Act and its history are both silent as to a private cause of action, "it seems well settled . . . that courts will in the face of such silence imply remedies . . . ," Note, "Cash Tender Offers," 83 Harvard Law Review 377 at 397-8 (1969); and in fact, the courts have had no difficulty in recognizing a private cause of action for violation of the Williams

Act, see *Bath Industries* v. *Blot,* 427 F.2d 97 at 113 (7th Cir. 1970), and *GAF* v. *Milstein,* 453 F.2d 709 at 719 (2d Cir. 1971).

C. Section 13(d) has increasingly been used as a weapon by entrenched management.

We have seen that section 13(d) was enacted to provide information to shareholders and that although not explicitly providing a remedy, the statute may be enforced by a judicially created private cause of action. The right of a private remedy has increasingly been used as a weapon by entrenched management in disregard of the statutory purpose. As the Second Circuit recently noted "A familiar defensive tactic increasingly used by target companies to delay or thwart a takeover bid made by a tender offeror has been the institution of a lawsuit against the offeror charging violation of the federal antitrust laws or non-disclosure of material information in violation of the Williams Act," *Corenco Corp.* v. *Schiavone & Sons, Inc.,* 488 F.2d 207 at 210 (2d Cir. 1973).

In bringing these lawsuits, management is not always staunchly protecting its shareholders from predatory raiders. "Management's actions do not always reflect an attempt to protect the shareholders's freedom of decision but rather may reflect a desire to prevent the takeover and preserve its control. Thus, the courts must carefully scrutinize management's claims of illegality and nondisclosure." "The Courts and the Williams Act: Try a Little Tenderness," 48 N.Y.U. L. Rev. 991 at 1011 (1973). ". . . District Judges must be vigilant against resort to the courts on trumped-up or trivial grounds as a means for delaying and thereby defeating legitimate tender

offers," *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937 at 947 (2d Cir. 1969).

The Circuit Court decision in the Rondeau case encourages management's use of section 13(d) as a weapon because the decision mandates imposition of a severe penalty against an offeror—sterilization of his stock's voting rights—regardless of the factual background which led to violation of the statute. In creating this penalty the Circuit ignored the admonition of Congress that the Williams Act was neutral in corporate management struggles, and converted a disclosure and regulatory statute to a penal law. It appears that the Circuit Court concluded that an injunction had to be entered for the reasons that only by the entry of an injunction could the Act be vindicated (viz., if the statute is violated there must be a remedy) and that an injunction would deter future violators. There is no principle of federal jurisprudence that *requires* a penalty for a technical, unknowing violation of a regulatory statute which has been corrected by the violator upon learning of his error. It is neither necessary nor appropriate to enter a harsh punitive order in every case to carry out the purposes of the Williams Act. It may well be, as here, that the Act has been vindicated, that its purposes have been served, before the Court is called upon to enter an injunction or provide any other form of relief. In a very real sense, the threat of a private action by management to enforce the Williams Act, which the courts have properly sanctioned, in itself serves to enforce the Act. Rondeau's technical violation occurred in the period from May 27 to August 25, 1971. This action was filed on September 2, 1971. Mosinee initially moved for a preliminary in-

junction but then withdrew its motion. As Mr. Rondeau states in his affidavit in support of his motion for summary judgment (App. 134) the very pendency of this action and the concommitant uncertainty of result has made it impossible for him to consider a tender offer for Mosinee stock or a proxy contest. The threat of a civil lawsuit with its attendant expense and delays is probably the strongest regulatory mechanism built into the Williams Act.

There is, we submit, no logic in the argument that to deter future potential violators some injunctive remedy must be constructed for every violation of the Act no matter how technical, especially when the violation has been cured. A person is only deterred if he knows that a proposed course of action will violate a law and that he is likely to be penalized if he proceeds with the action. Obviously, Mr. Rondeau would not have been deterred by the threat of an injunction because he did not know that he was required to file a Schedule 13D and might suffer a penalty if he failed to file. Knowing violations of the Williams Act will almost always be part of a covert, conspiratorial scheme to gain control of a corporation. Those who would engage in such activities will knowingly fail to file a Schedule 13D if they think they can gain tactical advantage before their conduct is enjoined. In those situations some injunctive decree is, of course, appropriate to vindicate the Act. Knowing and knowledgeable violators of the Williams Act are deterred because they will know that intentional violations will be enjoined, especially when such violations are part of a covert scheme to obtain control of a corporation before management and shareholders can react. Such a description does not fit Francis Rondeau.

The disenfranchisement of a portion of Rondeau's Mosinee stock provides no benefit to Mosinee shareholders other than the cold comfort of learning that for every violation of the Williams Act there must be a remedy. Moreover, there is no comparable remedy which deters incumbent management from misuse of the Act. The effect of the Circuit Court decision is to frustrate stockholder democracy by removing as an active participant in the affairs of Mosinee a stockholder of importance who may have ideas to present and may be in a position to improve the management of the corporation if he is free to exercise in full his rights as a stockholder.

This Court has recently held in another area of securities law that it will not impose a harsh penalty for a technical violation of a statute in circumstances where to impose a penalty would not further the legislative policies of the Act. In *Kern County Land Co. v. Occidental Petroleum Corp.,* 411 U.S. 582 (1973), plaintiff proved a technical violation of section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78p(b)). Nonetheless, no relief was awarded because the violation was found not to have resulted in short-swing profits based on insider information. Section 16(b) was enacted to prevent short term profits for corporate insiders speculating on the basis of secret information. The Court held that where there was no evidence of insider speculation the statute should not apply, even if its language seemed broad enough to include those "statutory insiders" who had no actual secret information. "In deciding whether borderline transactions are within reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to pre-

vent . . . (,) thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits," 411 U.S. 494-5.

II. RELIEF IN A SECTION 13(d) ACTION SHOULD BE FLEXIBLE AND APPROPRIATE TO THE PURPOSE OF THE ACT: IN THE ABSENCE OF IRREPARABLE HARM INJUNCTIVE RELIEF IS INAPPROPRIATE.

A. The materiality of the violation and passage of time after the violation is cured are relevant considerations in determining the form of an appropriate judgment.

Because district courts have the power to grant virtually any relief that is appropriate in a Williams Act case, they have the corresponding responsibility to see that shareholders and management are timely and honestly informed, but that the "balance is not tipped" to protect management from legitimate shareholder action designed to alter management. Rational exercise of this power requires thoughtful consideration of the clearly stated policy of the Act in the differing factual setting of each case. Courts must bear in mind that the real object of the Act is the proper exercise of shareholder democracy, not the protection of management.

For the most part, courts in fashioning remedies in Williams Act cases have demonstrated desirable flexibility and have fashioned appropriate relief. Five forms of relief have been considered: recision, divestiture of shares, damages, limitation of voting rights (sterilization of stock), and injunctive relief delaying takeover bids. See Young, "Judicial Enforcement of the Williams Amendments: The Need to Separate The Questions Of Violation and Relief," 27 BUSINESS LAWYER 391 at 402-405 (1972). An overriding concern of the courts has been to tailor relief

to fit the nature of a particular violation without transgressing the bounds of equity by meting out punishment. See *Committee For New Man. of Butler Aviation* v. *Widmark,* 335 F.Supp. 146 at 155 (E.D.N.Y. 1971). A review of Williams Act cases shows the courts have generally insisted that violations be cured, but have imposed no further permanent or punitive penalty.

In *Butler Aviation International Inc.* v. *Comprehensive Designers Inc.,* 425 F.2d 842 (2d Cir. 1970), the court affirmed the preliminary enjoining of an offeror in violation of the Williams Act but provided that the offer might go forward after full disclosure. In *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 370 F.Supp. 597 (D.N.J.), *aff'd* 497 F.2d (3rd Cir. 1974), the court recognized that an offeror may amend its schedules to cure defects, may rely on the amendments to satisfy the statute, and may be entitled to dissolution of a temporary injunction against an offer after the curative amendments are made. In *Corenco Corp.* v. *Schiavone & Sons, Inc.,* 488 F.2d 207 at 210 (2d Cir. 1973) the court affirmed the trial court's decision to permit the tender offer to proceed after filing and distribution of curative amendments. In *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247 (2d Cir. 1973) the court ordered a preliminary injunction against an offer until certain curative disclosures were made. In *Texasgulf Inc.* v. *Canada Development Corp.,* 366 F.Supp. 374 (S.D. Tex. 1973), the court permitted the tender offer to proceed so long as the offeror's 13(d) violation was cured and shareholders who had already tendered prior to the curative amendments were permitted to withdraw.

In *Bath Industries, Inc.* v. *Blot,* 427 F.2d 97 at 113 (7th Cir. 1970), the Seventh Circuit itself affirmed a trial court order enjoining a takeover bid, which order was to be effective only until it was determined that the parties enjoined had complied with section 13(d).

In *Chris-Craft Industries* v. *Piper Aircraft Corp.,* 480 F.2d 341 (2d Cir.), *cert. denied* 414 U.S. 910, 414 U.S. 924 (1973), the court did impose a five year ban against voting the stock which was acquired during a Williams Act violation. But the facts in *Chris-Craft* were entirely different from those in this case. An analysis of *Chris-Craft* supports and illustrates the argument presented here: that remedies must be framed to fit the differing facts of each case. Chris-Craft Industries was awarded damages for misstatements, judged to be in violation of section 14(e) of the Williams Act and S.E.C. Rule 10b-6 by the management of Piper Aircraft, Bangor Punta Corp., and other defendants. After a wide ranging battle for corporate control of Piper Aircraft, Chris-Craft lost its takeover bid. That a violator of the Securities Exchange Act should be allowed to retain the benefit (i.e. control the acquired corporation) of its misdeed (misleading registration statements) was deemed inequitable and in contravention of the purpose of the laws involved. Therefore, Bangor Punta besides being found liable to Chris-Craft for the latter's monetary loss in the takeover bid, was "denied the fruits of obtaining Piper shares illegally."

The instant case is factually dissimilar to *Chris-Craft* because Rondeau does not have anything like the "fruits" enjoyed by Bangor Punta. Rondeau does not control Mosinee (indeed there has never been a

tender offer or proxy battle). Rondeau's violation was not a calculated act committed in a heated struggle for corporate control. Mosinee could make no showing that any party was substantially (much less irreparably) harmed by the late filing of Rondeau's Schedule 13D. Granting equitable relief in *Chris-Craft* vindicated the purpose of the Securities Exchange Act of 1934 by punishing a party which, through a misleading registration statement, had actually won control of a target corporation and in doing so had prevented open and fair exercise of stockholder democracy. However, similarly harsh relief in the Rondeau case would impede stockholder democracy because the threat of such retaliation for even innocent, noninjurious violations will scourage potential challengers from entering the market. The differences between *Chris-Craft* and *Rondeau* are clear when we compare the potential harm and resulting need for equitable relief in the context of an actual battle for corporate control as contrasted with a simple late Schedule 13D filing followed by complete compliance for more than three years.

The point to be made is that the courts must be free to heed the admonishment of that exalted authority whose "object all sublime" was to "let the punishment fit the crime." See *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937 at 947 (2d Cir. 1969). If district courts are to fashion appropriate forms of relief in Williams Act cases they should not be bound to enter an injunction for every violation of the Williams Act no matter how technical, insubstantial or moot. District courts should be free to dismiss Williams Act cases where the purpose of the Act has been vindicated by the filing of

a legally sufficient Schedule 13D and the passage of time, and when no harm has resulted which requires further relief.

If the opinion of the Seventh Circuit in this case, with its apparent hostility to potential offerors and proxy solicitors, becomes the law in Williams Act cases, tender offers and proxy contests are likely to be inhibited and the Williams Act will become even more a potent tool to protect incumbent management. The fundamental error of the Seventh Circuit is its misreading of the statutory purpose of the Act. It has concluded the Act requires some punitive remedy for every violation. The Seventh Circuit fails to recognize that the Act may be vindicated by a late but legally sufficient filing of a Schedule 13D together with the passage of time which may result from the filing of an action by incumbent management. The Seventh Circuit has overlooked the fact that the simple filing of a Williams Act case without regard to the merits of the action or the materiality of the violation upon which the action is based may achieve the purposes of assuring that a legally sufficient schedule has been filed and that shareholders and management have adequate time to respond to it.

If the inflexible approach of the Seventh Circuit is set aside, district courts should have no difficulty in fashioning flexible remedies appropriate in each case. Where the violation of the Act appears to be deliberate, covert, and perhaps conspiratorial, and for the purpose of achieving some strategic advantage in a tender offer or proxy contest, injunctive relief and even, perhaps, temporary sterilization of improperly acquired stock may be appropriate. In circumstances where the deliberateness of the violation is in ques-

tion but a legally sufficient Schedule 13D is ultimately filed, some form of temporary relief may be appropriate to permit management and shareholders to respond to the takeover bid. Where it can be shown the Schedule 13D that was filed contains a material omission or is deliberately misleading, obviously some form of relief requiring the defendant to file a correct and legally sufficient Schedule 13D is appropriate. Where, as here, it is determined that the violation was not deliberate or covert, where the violation has been cured by filing of a legally sufficient Schedule 13D, where there has been no takeover attempt, and where management and shareholders have had an adequate opportunity to respond to the information disclosed in the Schedule 13D, the Act has been vindicated and the most appropriate remedy is dismissal of the action. "The Williams Amendments: An Evaluation of the Early Returns," 23 VAND. L. Rev. 700 at 727 (1970). The distinction between the case which calls for drastic relief and that which requires little or no relief will frequently turn on the materiality of the information not disclosed or disclosed in a misleading manner and the time of filing a legally sufficient schedule in the context of the takeover bid.

In this case, the District Court found that Rondeau's violation was technical, unintentional, and caused no harm to the shareholders of Mosinee. Judge Doyle concluded that because there was no material intentional violation and no legally recognizable harm, no injunctive or other relief against Rondeau was appropriate, particularly in view of the passage of time. The Court of Appeals did not reject the factual findings of the District Court but rather wrote into section 13(d) the requirement that for every violation there

must be a punishment, and directed the harsh punishment of partial disenfranchisment. Thus, for the Seventh Circuit at least, the Court ~~of Appeals has~~ impaired the essential element in fashioning appropriate judgments in Williams Act cases—flexibility.

B. Injunction is a remedy available under Section 13(d) but the elements for injunctive relief must be shown: irreparable harm is necessary unless different grounds are created by statute.

In framing relief under section 13(d) the courts have often had recourse to some form of injunctive relief. The injunction is a valuable and flexible remedy available preliminary to maintain the status quo, or by way of permanent remedy, as in *Chris-Craft* v. *Piper Aircraft,* 480 F.2d 341 (2d Cir. 1973). But although it is a flexible tool, it is not without standards for its use. And among those standards has been the requisite finding of irreparable harm, *American Federation of Labor* v. *Watson,* 327 U.S. 582 at 593 (1946) unless a different threshold, is prescribed by the legislature, *Walling* v. *Builders' Veneer & Woodwork Co.,* 45 F.Supp. 808 (E.D. Wis. 1942); see also, 14A Cyclopedia of Federal Procedure (3rd Ed.) § 73.12* The following Williams Act cases have rec-

* Irreparable harm as a necessary precondition for injunctive relief is recognized throughout federal jurisprudence: *Beacon Theatres* v. *Westover,* 359 U.S. 500 (1959) (antitrust law); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 54 U.S. (13 How.) 518 (1851) (abating a nuisance); *Cameron* v. *Johnson,* 390 U.S. 611 (1968) (civil rights); *Locomotive Engineers* v. *M.-K.-T. R. Co.,* 363 U.S. 528 (1960) (labor law); *Embassy Dairy* v. *Camalier,* 211 F.2d 41 (D.C. Cir. 1954) (standard for preliminary injunction in milk inspection case); *Sellers* v. *Regents of University of California,* 432 F.2d 493 (9th Cir. 1970), cert. den. 401 U.S. 981 (1971) (student rights); *Reed Enterprises* v. *Corcoran,* 354 F.2d 519 (D.C. Cir. 1965) (obscenity law).

ognized the necessity of finding irreparable harm in determining if an injunction should be granted: *Cattlemen's Investment Co.* v. *Fears,* 343 F.Supp. 1248 at 1253 (W.D. Ok. 1972); *Ozark Air Lines* v. *Cox,* 326 F.Supp. 1113 at 1119 (E.D. Mo. 1971); *Gulf & Western Industries Inc.* v. *Great A & P Tea Co., Inc.,* 476 F.2d 687 at 692 (2d Cir. 1973); *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247 at 250 (2d Cir. 1973); *Columbia Ribbon and Carbon Mfg. Co. Inc.* v. *Kapralos,* 374 F.Supp. 500 at 501 (E.D.N.Y. 1974).

The need to forestall irreparable injury cuts close to the heart of what injunctive relief is all about. Injunctive relief should be exercised only when intervention is essential to protect property or other rights against irreparable harm. "The very function of an injunction is to furnish preventive relief against irreparable mischief or injury and the remedy will not be awarded where it appears to the satisfaction of the court that the injury complained of is not of such character." 42 Am.Jur.2d *Injunctions* § 48, pp. 787-88; see also 42 C.J.S. *Injunctions* § 23. From a historical perspective, there would be no equitable injunction if it were not dependent on a finding of irreparable harm, see Fiss, *Injunctions,* pp. 9-29 (Foundation Press, 1972).

In overlooking historical development and precedent, the Court of Appeals set forth almost no explanation for its novel holding that irreparable harm is not necessary for injunctive relief under section 13 (d). The majority opinion concludes that a Williams Act plaintiff need not show irreparable harm in order to obtain permanent injunctive relief "in view of the fact that (Mosinee) as issuer of the securities is in

the best position to assure that the filing requirements of the Williams Act are being timely and fully complied with and to obtain speedy and forceful remedial action when necessary." The supporting explanation speaks to two points: 1. the question of whether Mosinee has standing to sue to enjoin Williams Act violations by its shareholders; 2. the question of whether private enforcement of the Williams Act by management is appropriate. The explanation does not meet the question of whether injunctive relief is appropriate where management cannot show that it has suffered legally recognizable harm, much less irreparable harm.

The majority opinion does state that to the extent Rondeau's schedule was filed late, Mosinee was harmed because it did not timely receive the relevant information surrounding Rondeau's potential to effect control and was delayed in its efforts to make any necessary response to that potential. This broad conclusion is not supported in the record or in the findings of Judge Doyle. In fact, in 1971 the management of Mosinee was informed of Rondeau's purchases of Mosinee stock before his schedule was filed and Forester's very substantial purchases of Mosinee stock may have been in response to Rondeau. When Rondeau's schedule was filed, Mosinee's management had adequate opportunity to respond and call to the attention of Mosinee shareholders the information contained in Rondeau's Schedule 13D. Surely, by the time the motion for summary judgment was filed some months after Rondeau's schedule was filed and this action was commenced, management had had more than adequate opportunity to make whatever response it felt was appropriate to "Rondeau's potential." But more importantly, at the time that the Court of Appeals in-

structed the District Court to sterilize part of Rondeau's Mosinee stock through the entry of an injunction, a year and one-half had passed since Rondeau's Schedule 13D had been filed, and during that period no proxy contest or tender offer had taken place and there could be no doubt that Mosinee management had had an adequate opportunity to "respond to (Rondeau's) potential" to effect control of the company. It is no wonder that the majority opinion was obliged to conclude that Mosinee need not show irreparable harm as a prerequisite to obtaining injunctive relief.

The Seventh Circuit Court of Appeals makes no real effort to explain its retreat from support of the irreparable harm requirement as stated in *Bath Industries* v. *Blot,* 427 F.2d 97 at 113 (7th Cir. 1970). As Judge Pell argues persuasively in dissent: "We start with the cardinal principal that 'the basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.' *Beacon Theatres* v. *Westover,* 359 U.S. 500 at 506-7. I am unaware of any reason for lowering the standards in the use of the injunction and agree with Judge Doyle's observation of what the law is in this respect: 'Although one court has stated in dicta that the absence of irreparable harm does not necessarily preclude injunctive relief where the public interest is involved. . . . ,' *Sisak* v. *Wings & Wheels Express, Inc.,* 1971 CCH Fed. Sec. L. Rep. ¶ 92,991 at 90,670 (S.D.N.Y. 1970), other courts have expressly stated that a finding of irreparable harm is a prerequisite to injunctive relief," (App. 173). To this we would add that even in *Sisak* plaintiffs could make no case for injunctive relief, and none was granted.

CONCLUSION

Petitioner Rondeau's mistake was in failing to file a timely Schedule 13D. The violation of section 13(d) has long been cured. The District Court, after examination of the facts, concluded no relief was warranted and that no injury was threatened or achieved. In reversing the District Court, the Circuit Court judicially created an automatically imposed penalty for the statute, which Congress did not intend. Additionally, the Circuit Court, upsetting the traditional practice of equity courts, ordered an injunction without a showing of irreparable harm. Reversal of the Seventh Circuit decision will restore the Williams Act to the neutral posture Congress intended, safeguard the elements of injunctive relief as that body of law has been defined by experience, and do justice to Rondeau. For these reasons, it is respectfully submitted that the judgment of the Court below should be reversed and the District Court's judgment of dismissal should be reinstated.

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